

# **EXHIBIT B**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

EFG BANK, Cayman Branch, et  
al.,

Plaintiffs,

v.

AXA EQUITABLE LIFE INSURANCE  
COMPANY,

Defendant.

17 Civ. 4767 (JMF)

Conference

New York, N.Y.  
May 8, 2018  
3:35 p.m.

Before:

HON. JESSE M. FURMAN,

District Judge

APPEARANCES

ORRICK HERRINGTON & SUTCLIFFE LLP  
Attorneys for Plaintiffs  
BY: KHAI LeQUANG  
DANIEL ROBERTSON

MILBANK TWEED HADLEY & MCCLOY LLP  
Attorneys for Defendant  
BY: STACEY J. RAPPAPORT  
ANDREA G. HOOD  
ROBERT C. HORA

1 (Case called)

2 MR. LeQUANG: Good afternoon, your Honor, Khai LeQuang  
3 for the plaintiffs.

4 MR. ROBERTSON: Good afternoon, your Honor, Daniel  
5 Robertson for the plaintiffs.

6 MS. RAPPAPORT: Good afternoon, your Honor, Stacey  
7 Rappaport; Milbank Tweed Hadley & McCoy for defendant AXA  
8 Equitable Life Insurance Company. With me today are my  
9 colleagues, Andrea Hood and Robert Hora.

10 THE COURT: Good afternoon to all of you. Sorry I'm  
11 running a little bit behind.

12 You and your colleagues are certainly keeping me busy.

13 We have a number of things to cover today. Let me  
14 start with the motion for re-reconsideration that was filed I  
15 think yesterday or the day before by plaintiffs, or by EFG,  
16 with respect to my ruling with respect to the protective order  
17 issue.

18 I can only describe the most recent motion as a rather  
19 thin motion, but for that reason and others it is denied. I  
20 think EFG falls far short of demonstrating that there is a  
21 basis for reconsideration, let alone re-reconsideration, which  
22 is what this motion would be. A description of the new Swiss  
23 cases I think AXA describes it as threadbare, and I certainly  
24 agree with that.

25 It is a criminal case, not a civil case, but, more

1 importantly, given the reasoning of my prior opinion, it's not  
2 clear from the threadbare description of the case if the  
3 materials at issue were produced with the threat of criminal  
4 consequences or procedural consequences. That was the critical  
5 distinction in my prior order.

6 In addition, I cited a decision of the FDJP, stating  
7 that Article 271 does not apply to the collection and transfer  
8 of one's own information as distinct from transfer of  
9 third-party data, and the case at issue in the most recent  
10 motion appears to involve the transfer of third-party data  
11 rather than, as in this case, EFG's own materials.

12 On top of that, it's unclear to me from the motion  
13 whether or to what extent EFG knew or should have known about  
14 that other case when it filed either of its first motions. A  
15 letter says that the case was quote/unquote revealed after my  
16 last order.

17 The trial began on April 26 and, granted, I don't know  
18 a whole lot about Swiss criminal procedure, but I find it a  
19 little hard to imagine that it was secret until after my order.  
20 Be that as it may, there was obviously some prior notice of the  
21 proceedings writ large since there was reference to the  
22 Department of Justice Swiss bank program in prior papers and  
23 the present motion relies in part on a four-year-old article  
24 regarding disclosure of the data at issue.

25 For all of those reasons, the motion falls far short

1 of warranting reconsideration yet again.

2 EFG states in its most recent letter that if I would  
3 think that additional briefing is appropriate that it's  
4 prepared to do so, but as far as I'm concerned, that's not the  
5 way motion practice works. If you have an argument to make,  
6 you make an argument. You don't make an argument and say, if  
7 you don't think that's enough, we are prepared to try again.  
8 You've now had, by my count, three times to persuade me, and  
9 you have failed to do so, so we are done.

10 Next, there are two April 27 letter motions on the  
11 agenda today. The first is docket No. 143, which AXA moved to  
12 compel plaintiffs to produce documents concerning their  
13 analyses, valuations, and acquisition of the AULII life  
14 insurance policies and to respond to interrogatories concerning  
15 the same.

16 I guess I wanted to get a little bit more of a handle  
17 on this and, in particular, get AXA's responses to EFG's  
18 response, AXA's reply to the opposition. Namely, I don't quite  
19 understand. It seems to me that the issue in this case  
20 concerns the mortality assumptions that went into your pricing  
21 at an aggregate level, and in that regard their views and  
22 calculations in a particular case of someone's life expectancy  
23 don't just seem to go to the heart of anything at issue in this  
24 case and in that sense strike me as both irrelevant and that  
25 the burdens far outweigh the benefits. Tell me why that's

1 wrong.

2 MS. RAPPAPORT: Your Honor, in the first instance,  
3 plaintiffs have not made any particularized burden argument  
4 here. So AXA disagrees that there has been any showing that  
5 EFG faces any burden or any of the EFG plaintiffs face any  
6 substantial burden that would preclude them from producing the  
7 documents.

8 Your Honor, what is at issue in this case are the  
9 reasonableness of the assumptions that AXA used when it  
10 increased cost of insurance in this COI increase that it  
11 implemented in 2016.

12 THE COURT: My understanding is that those assumptions  
13 were based on essentially data, first of all, mortality data,  
14 not life expectancy data, but mortality data, and from  
15 thousands, if not hundreds of thousands of policies at the  
16 aggregate level, not an individual assessment of life  
17 expectancy in any one case.

18 MS. RAPPAPORT: Your Honor, plaintiffs' individual  
19 life expectancy and the reports that show their individual life  
20 expectancies relate to their mortality assumptions.

21 If your Honor would permit, I would like to hand up a  
22 document that would show this point very clearly.

23 MR. LeQUANG: Your Honor, if I may address this  
24 document.

25 THE COURT: You will have your chance in a moment.

1 MS. RAPPAPORT: Your Honor, I just want to note for  
2 the record that this document, which is Bates stamped  
3 EAA00021910 through EAA00021915, was produced by the plaintiffs  
4 in this litigation. It is marked confidential.

5 I conferred with counsel for the EFG plaintiffs prior  
6 to the conference today. AXA would agree to redact the insured  
7 last name on this document and other identifying information on  
8 this document because the last name is included elsewhere. But  
9 otherwise takes no position on the confidentiality of this  
10 document. And under the confidentiality order your Honor, I  
11 believe we have an agreement as to how this document will be  
12 handled in terms of its confidentiality. But Mr. LeQuang can  
13 speak to that later. We would be happy to address the  
14 confidentiality issues and sealing issues in a separate  
15 submission, if necessary.

16 THE COURT: I will table that for a moment. Tell me  
17 what significance this has.

18 MS. RAPPAPORT: Your Honor, whether this is called a  
19 life expectancy report or a mortality analysis is really of no  
20 moment. Plaintiffs do analyze or someone on behalf of the  
21 plaintiff have analyzed the life expectancy of this particular  
22 individual in this report. But they have derived, based on  
23 that life expectancy, a mortality rate, their own mortality  
24 assumptions based on when they believe this individual would  
25 perish.

1           The mortality rates that are reflected on this  
2           schedule are not something that's been brought out of thin air.  
3           These are mortality rates that the entity who did this analysis  
4           derived from a mortality table that it was using concerning  
5           certain mortality assumptions that it had developed and that  
6           plaintiffs may have adopted. This was something that was in  
7           plaintiff's files which presumably they relied upon which they  
8           decided to acquire or otherwise invest in these policies, and  
9           this document shows that the mortality assumptions that this  
10          entity was assuming would exist for this particular policy  
11          showed that the policy was significantly underpriced, that is,  
12          that AXA's mortality assumptions were significantly different  
13          than the mortality assumptions that this entity was presenting  
14          here.

15           The reason why that's important, your Honor, is  
16          because plaintiffs are contending that AXA's mortality  
17          assumptions were not reasonable. If AXA's mortality  
18          assumptions were not reasonable, we are entitled to show what  
19          plaintiffs' mortality assumptions about these very policies  
20          were and to explore what mortality tables plaintiffs were  
21          relying on, which is something that can be derived from this  
22          document and other documents that may support this particular  
23          document.

24           Whether this is called a particular life expectancy  
25          report or a mortality analysis, AXA is entitled to say, our



1 mortality assumptions for an individual of this category,  
2 however this person was categorized, whether it's an  
3 82-year-old who met certain underwriting standards, AXA is  
4 entitled to look at that particular categorization, look at how  
5 AXA recognized that individual, what mortality assumptions  
6 applied to that category of individuals and see what mortality  
7 assumptions plaintiffs were applying to that individual.  
8 Whether AXA was using plaintiffs' mortality assumptions is not  
9 the issue on this motion. The issue is a comparison between  
10 the mortality assumptions that plaintiffs were using and the  
11 mortality assumptions that AXA was using.

12 THE COURT: Maybe I'm missing something, which is  
13 certainly possible and part of the reason that a conference  
14 might be helpful here. The way I understood what you just  
15 described is essentially that this document would reveal the  
16 application of their mortality assumptions to a particular  
17 human being, and that by looking at this you could essentially  
18 extrapolate backwards to figure out what those assumptions  
19 were.

20 Can't you skip the extrapolation part? And I think  
21 that they are not disagreeing that you are entitled to whatever  
22 documents, materials, and information they have concerning  
23 their actual mortality assumptions, including whatever tables  
24 they are using, whatever illustrations they are relying on,  
25 whatever documents they have in their possession concerning

1 whatever mortality assumptions that they are using. I  
2 certainly agree that that would be relevant and go to the heart  
3 of what you are describing and the reasonableness of your own  
4 assumptions, but what I'm missing is how the application of  
5 those assumptions to a particular person, which is what this  
6 document seems to reveal, has any bearing on the argument that  
7 you are trying to make.

8 MS. RAPPAPORT: Your Honor, it is not at all clear  
9 what mortality table when plaintiffs said they are intending to  
10 produce to us a mortality table. Life settlement investors  
11 like plaintiffs in the industry and insurers rely on  
12 industry-based mortality tables and then apply their own sets  
13 of factors to those mortality tables to determine a mortality  
14 assumption. If plaintiffs were just going to give us an  
15 industry standard mortality table and say, this is what we  
16 based our mortality assumptions on, that doesn't really help us  
17 much because we don't understand what other factors they apply  
18 to it. They have gotten information about AXA's mortality  
19 improvement factors, other multiples in what are called scalers  
20 that are applied to the mortality table to come up with what  
21 the actual assumption is. And this document, the more detailed  
22 information in here would reveal some of that information,  
23 whereas a plain vanilla industry mortality table would not, so  
24 that is why these types of analyses are important.

25 THE COURT: Would it not then make sense for you to

1 wait and see what they provide you in terms of the underlying  
2 or overall assumptions are, including whatever tables they are  
3 using, whatever tweaks they are using to make it to the  
4 industry standards and tables or whatever before you determine  
5 whether you need to get into the policy-level assumptions and  
6 calculations?

7 MS. RAPPAPORT: Your Honor, we have been waiting for a  
8 very long time, but I am not sure that the mortality  
9 assumptions and tables would be enough. Again, we want to see  
10 how they were categorizing this particular individual and what  
11 mortality rates that they were applying to an individual, and  
12 from there we can develop our own analyses about what they were  
13 doing across the whole portfolio.

14 We have been waiting for a very long time for  
15 documents from EFG. Their responses to us have not been, A,  
16 forthcoming or, B, very revealing about what types of specific  
17 information they are going to give us, and we are entitled to  
18 see, in our opinion, the mortality analyses that they did when  
19 they determined to acquire the policies.

20 I think another important point, your Honor, that this  
21 particular document drives home for us is the view that they  
22 knew that this policy was underpriced, that the mortality  
23 assumptions that AXA was applying were different from the ones  
24 that they would apply, that the mortality assumptions that they  
25 would apply were significantly worse than the ones that AXA

1 would apply, and that's something that we believe we are  
2 entitled to show.

3 THE COURT: Last question. To the extent that burden  
4 is a factor here, could you not get what you need with some  
5 sampling of the individual policies, that is to say, five or 10  
6 as opposed to all 106 or so that are at issue here?

7 MS. RAPPAPORT: Again, your Honor, it would depend on  
8 what the underlying data is that EFG is prepared to provide.  
9 If we had every single mortality table with every single factor  
10 that they applied and every single multiple that they were  
11 applying to that mortality table, I might be able to come to  
12 some agreement to some more limited set of data. But right now  
13 if all we are going to get is a standard industry table, that  
14 would not be sufficient.

15 THE COURT: Why is it that you don't have that larger  
16 set of materials already?

17 MS. RAPPAPORT: I think that's a question for Mr.  
18 LeQuang. So far we have received no documents from  
19 Switzerland, despite your Honor's order. The substantial  
20 completion deadline is coming up on May 25. We have received  
21 no e-mails that's the subject of our other motion, and there  
22 has just been a very slow trickle of documents and they have  
23 agreed only to produce only a very limited set of documents,  
24 your Honor, documents, frankly, that are not really the kind of  
25 documents that are essential to our defense of this case. For

1 example, they have agreed to give us documents that AXA  
2 provided to them, policy files, their premium showing that they  
3 paid their premiums. While we want those documents and we  
4 appreciate they are agreeing to give those to us, they have not  
5 given us the real mortality data that we are looking for and  
6 that we need in order to defend against their claims that our  
7 assumptions that were applied to the COI increase were  
8 unreasonable.

9 THE COURT: Mr. LeQuang, first, let me take care of an  
10 easy matter. Any objection to this document being docketed,  
11 assuming that the personal identifying information is redacted?

12 MR. LeQUANG: With the redaction we are fine with  
13 that, your Honor.

14 THE COURT: Would you prefer to do the redaction?

15 MR. LeQUANG: Yes. We will take a look. One of the  
16 issues I think is just whether only the identifying information  
17 should be redacted. We will review it and determine whether  
18 anything else should be redacted.

19 THE COURT: Why don't the two sides just confer on  
20 that and within the next two days hopefully agree upon as  
21 minimal redactions as necessary to ensure the privacy of the  
22 person there and docket that.

23 I think you would be on firmer ground in making the  
24 arguments you are making if you had already turned over all of  
25 the sort of general materials and information concerning the

1 mortality assumptions that you were using to make the  
2 individual life expectancy calculations. But, number one, it  
3 sounds like you haven't done that. Why shouldn't I give them  
4 all this? To the extent that you haven't done it, when do you  
5 plan to make production of those materials?

6 MR. LeQUANG: The first thing I want to say, I don't  
7 think that's an accurate description of where we stand in the  
8 production. There are two plaintiff groups within the EFG  
9 group of cases. One is EFG, the bank, with Wells Fargo as  
10 securities intermediary. That represents the EFG ownership  
11 group.

12 In addition, there are several trust entities that own  
13 policies and that represents an entirely different ownership  
14 group, which is EAA, which stands for Erste Abwicklungsanstalt.

15 Erste Abwicklungsanstalt, or EAA, is a governmental  
16 agency, German governmental agency, that was formed to wind up  
17 the assets of a German bank called WestLB or Portigon. EAA has  
18 virtually completed its production of all of its documents.  
19 There were meet and confer discussions regarding new custodians  
20 and EAA is in the process of collecting and producing those  
21 documents, but the suggestion that EAA has somehow has not  
22 produced documents or not completed its production of documents  
23 in a prompt manner is entirely erroneous. The production of  
24 those documents would include anything of the ilk that  
25 Ms. Rappaport had just described, including any mortality

1 assumptions or scalers or anything of that kind.

2           This motion under the issue before us today is with  
3 regard to individual policy valuations and individual life  
4 expectancies. Those are what we objected to producing, and we  
5 specifically, in accordance with the rules, identified that as  
6 a category of documents we would not be producing in our first  
7 objections in responses to their requests for production months  
8 ago.

9           We reached an impasse based on this discussion and  
10 meet and confer long ago in this. I'm happy to discuss it, but  
11 the suggestion that we have not produced those documents that  
12 are otherwise are more broadly relevant, I don't think that is  
13 accurate.

14           EFG, that group, as your Honor knows, has not produced  
15 documents from Switzerland. I don't know what is included  
16 within those. But I also think Ms. Rappaport is just  
17 speculating that there are things like mortality assumptions or  
18 anything of that kind regardless.

19           The history here is that we are policyholders. We are  
20 not insurance companies. The type of document you are seeing  
21 here is not an insurance company document. It's not mortality  
22 assumptions. In fact, if we waited until there was some  
23 additional discovery to talk about the nature of the interests  
24 of both EAA and EFG, AXA would learn, for example, that EFG --  
25 or let's take EAA. EAA inherited the assets of WestLB or

1 Portigon. Portigon owned a security interest in these policies  
2 by making loans to other companies that themselves acquired the  
3 policies.

4 What you see when you see these valuations and a lot  
5 of documents like this are going to be loan administration  
6 documents, internal loan administration documents of a bank.  
7 And all they are doing is tracking the payments of the borrower  
8 that will need to be made or the value of their collateral to  
9 determine whether there is a default under the loan provisions.  
10 These things don't have to do with AXA's mortality assumptions.

11 In fact, this document here is dated June 2009, six  
12 years before AXA raised COI rates. Ms. Rappaport made a number  
13 of comments about what this reveals and I don't know where she  
14 gets that at all, including that the AXA policies are  
15 underpriced, because AXA's policies are priced at a certain  
16 level, but they have assumptions about premium payments that  
17 are more than just the cost of insurance charges.

18 So you can't tell anything from here other than the  
19 fact that in 2009, somebody on behalf of the policyholder's  
20 side expected to pay a certain amount of premiums over a  
21 particular period of time, and that particular period of time  
22 was determined by obtaining medical records from these insureds  
23 who authorized them to obtain these medical records and allowed  
24 them to come up with life expectancy estimates and, therefore,  
25 a cash flow estimate or a cash projection of how long they



1 would have to pay these premiums.

2           They don't bear on the reasonableness of AXA's  
3 mortality assumptions. In fact, it is the current assumptions  
4 that are at issue, not the prior assumptions. You can look at  
5 that what their original assumptions are. But as the documents  
6 that we submitted show, AXA's own mortality analysis, what they  
7 did was they looked at the deaths, how many people died over  
8 the span of a number of years and whether that was more than  
9 what they had expected.

10           When we challenge the reasonableness of that, we will  
11 be challenging whether they actually had a basis in looking at  
12 the number of deaths under the AULII group of policies for  
13 raising rates or claiming to have suffered adverse mortality.  
14 The fact that some individual has 84 months to live or 64  
15 months to live when they are in 2009 and 74 years old is not  
16 going to bear upon that.

17           If there is a mortality assumption document, something  
18 out there that describes how we came up with certain  
19 assumptions, we are producing those documents. But here I will  
20 also say that when we talk about the history for EFG and EAA,  
21 these policies go back to I think 2004. You will have, I would  
22 guess, thousands of these types of reports, tons of e-mails we  
23 have done, and these are in the meet-and-confer letters that  
24 were submitted with the motion, just hit checks. So terms like  
25 LE, which would capture these life expectancies, I think we

1 indicated had somewhere around tens of thousands of hits and  
2 cover this 10-year-period of time where the role is simply a  
3 lender trying to keep track of its security interest. Are they  
4 relevant? I don't think so. Have they shown that they are  
5 relevant? No. Have we refused to produce the things that are  
6 relevant? No.

7 The only outstanding issue here really are the EFG  
8 plaintiff documents. I'm mindful of the Court's ruling with  
9 regard to the Hague convention. EFG will have to decide what  
10 it needs to do with regard to that issue.

11 THE COURT: On that issue, brief digression, has EFG  
12 collected those documents in Switzerland?

13 MR. LeQUANG: There was a first wave of documents.  
14 Those are all collected and ready for production. There were  
15 subsequent meet-and-confer discussions in which we agreed to  
16 collect from additional custodians and that collection and  
17 review is still in process, but it could be ready within weeks  
18 or something. It's hard for me to estimate at this point.  
19 Certainly by custodians or by the review we could, in theory,  
20 roll out productions. The issue is what will EFG do in light  
21 of its concerns.

22 THE COURT: You better decide that sooner rather than  
23 later. I'm not staying any deadlines in connection with this  
24 matter. As far as I'm concerned, it's decided and you  
25 represented in your motion papers that you were prepared to

1 produce those materials. It was just a matter of how and when,  
2 not whether, and, therefore, you should have undertaken  
3 whatever efforts were needed to collect them. I would not  
4 expect that collection would cause any sort of delay.

5 MR. LeQUANG: We have not delayed in any way that  
6 process.

7 THE COURT: Do you dispute the proposition that one  
8 could extrapolate from a document of this sort what mortality  
9 assumptions are being applied to this particular person? It  
10 sounds like you do.

11 MR. LeQUANG: I do. I don't see anything in here that  
12 suggests anything of what Ms. Rappaport had described can be  
13 gleaned from this particular document.

14 The one issue I did want to raise is, this was just  
15 given to me just prior to this hearing that wasn't submitted  
16 with the papers. I glanced at it briefly. I don't know and  
17 haven't had a chance to review it in its entirety, but, again,  
18 say that it is representative of the type of documents we  
19 intended to exclude for the reasons we have discussed.

20 THE COURT: What is your response to my thinking out  
21 loud that maybe some sort of sampling approach, giving them say  
22 five files, if I can call them that, as a way of providing them  
23 some means to sort of test their view that you can extrapolate  
24 relevant information from these documents? What is your  
25 response to that?

1 MR. LeQUANG: It does alleviate the significant burden  
2 concern. Because I obviously don't think it's relevant, I do  
3 believe we can accommodate that to address this particular  
4 issue. I don't think a document like this shows anything, and  
5 one of the burdens that I also would mention, as you can see  
6 with this document, I still don't believe that AXA would be  
7 entitled to know the life expectancies or medical records or  
8 have access to the medical records of these insureds and,  
9 hence, we would need to redact any identifying information,  
10 even in the production to AXA of documents like this. I  
11 suspect they will still have sufficient identifying information  
12 within this document to know that one of the insureds under  
13 their policy has a particular life expectancy based on a  
14 particular medical record review.

15 THE COURT: You produced this particular document to  
16 them.

17 MR. LeQUANG: This was produced inadvertently. It was  
18 just brought to my attention and that's why it is being used  
19 today.

20 THE COURT: Here is what I am going to do on this  
21 front because I do want to move things along, recognizing that  
22 we are already far behind.

23 MS. RAPPAPORT: Your Honor, may I be heard briefly on  
24 a few points that Mr. LeQuang raised?

25 THE COURT: Very briefly. We have other ground to

1 cover, and I have other cases awaiting.

2 MS. RAPPAPORT: Very quickly, your Honor. The fact  
3 that this document was a loan document, which is what's been  
4 represented here, that's not relevant. We are not looking at  
5 what the purpose of this was for. It is a valuation document.  
6 It does reflect mortality rates that an entity using an  
7 industry type table applying certain factors was using. That's  
8 No. 1.

9 With respect to the fact that the document is dated in  
10 2009, plaintiffs have requested AXA's interim mortality  
11 assumptions. They are not limiting themselves to assumptions  
12 that we are at pricing or assumptions at the COI increase.  
13 Things in between they view as relevant. Just as they have  
14 argued that they are entitled to see how our mortality  
15 assumptions have developed, we are entitled to see how the  
16 entities that we are valuing their policies also develop their  
17 mortality assumptions.

18 Those were the two points I wanted to raise.

19 THE COURT: For now I am going to deny the defendant's  
20 motion on this particular score. I'm really not persuaded that  
21 the policy level documents that we are discussing are going to  
22 yield the kind of information that is relevant to the arguments  
23 that the defendant wants to make. I certainly understand that  
24 argument. I just don't necessarily see how the application,  
25 unless plaintiffs obtained individual health-related

1 information and on that basis felt that somebody was likely to  
2 die sooner or live longer, whatever the case may be, that the  
3 mortality assumptions would have it. I don't see how that  
4 necessarily speaks to the reasonableness of the aggregate level  
5 mortality assumptions.

6 Having said that, maybe I'm wrong, maybe I don't  
7 understand precisely how AXA would extrapolate from this  
8 particular document, by way of example, the information that  
9 Ms. Rappaport is describing, so here is what I propose.

10 That you confer about this and do so quickly and, in  
11 particular, that you confer with respect to my proposal of  
12 possibly using some sort of sampling approach where AXA has  
13 provided five or 10 sets of policy-related documents on the  
14 theory that that would minimize the burdens but provide enough  
15 of a window or peek, if you will, into whatever assumptions are  
16 being applied to the individual policies at issue if indeed it  
17 reveals them at all.

18 If after that meeting and conferring you can't reach  
19 agreement, you can revisit this issue with me, in which case I  
20 would expect that using this document or otherwise, AXA should  
21 actually spell out in some detail how it would read into or  
22 read from this document the information that it says it needs,  
23 and that is to say, how it would use it and how it does speak  
24 to the reasonableness of the overall assumptions that are at  
25 issue. Why don't you do that. Why don't you meet and confer

1 sooner rather than later and let me know by the end of next  
2 week if you have reached agreement on this issue or if there  
3 are any issues that remain in dispute, in which case I will  
4 either have you back or resolve it at that point.

5           Next is the acquisition documents. According to the  
6 response, docket 146, plaintiffs have agreed to produce "any  
7 acquisition documents that bear on this issue, including  
8 documents concerning the circumstances under which AXA may or  
9 may not change COI rates, the possibility that AXA may or may  
10 not change COI rates, the COI provisions of the AULII policies  
11 and the COI increase." I must say, I would be a little bit  
12 anxious if I were in plaintiffs' shoes making those judgments  
13 and limiting disclosure only to things that meet that  
14 definition or those characteristics, but I certainly think that  
15 that adequately describes the relevant set of documents at  
16 issue, and in that regard I am not inclined to think that the  
17 broader set of acquisition-related documents is relevant here.  
18 Ms. Rappaport, is there something I'm missing on that score?

19           MS. RAPPAPORT: Your Honor, first, this implicates the  
20 same valuation type issues that AXA believes it's entitled to  
21 review documents about how plaintiffs valued the policies when  
22 they acquired them, including what mortality assumptions they  
23 were applying and what they thought, cost of insurance, the  
24 appropriate cost of insurance rate or the cost of insurance  
25 rate that they would calculate, based on their mortality

1 assumptions, should be. For the same reasons that we were just  
2 discussing, we believe that those valuation documents are  
3 important to AXA's defense.

4 In addition, there is no reason to limit plaintiffs'  
5 production to just the possibility of a COI increase or the  
6 narrow categories that they have described. Plaintiff has not  
7 articulated why we are not entitled to documents that they have  
8 in their possession concerning cost of insurance rates on the  
9 AULII policies that they own or they have an interest in, and  
10 those are the types of documents that we are looking for.

11 We are not convinced that this narrowing is at all  
12 sufficient and, frankly, are concerned about the type of  
13 limiting that plaintiffs are trying to do and how they are  
14 determining -- or a document showing an expectation of a  
15 different COI or what their internal COI rate or mortality rate  
16 would be, in our view, is something that bears on COI and goes  
17 to the possibility of the COI increase.

18 THE COURT: I agree. But maybe that just means that  
19 the devil is in the details of how broadly or capriciously one  
20 construes the category that I just read and that's from  
21 plaintiffs' letter. I would certainly think that documents  
22 relating to COI generally with mortality assumptions with  
23 respect to acquisition would fall within that category and be  
24 relevant, but I was reading it to include those. Am I wrong  
25 about that?



1 MS. RAPPAPORT: Are you asking Mr. LeQuang?

2 THE COURT: Yes.

3 MR. LeQUANG: I don't think you are wrong. Again, one  
4 of the things that would be helpful is to explain what we are  
5 talking about here. And when we say acquisition documents, for  
6 example, as I mentioned before, EAA obtained ownership over the  
7 assets of WestLB through a governmental transfer of assets from  
8 the bank. There is a ton of agreements and a lot of e-mails  
9 and discussions about that transfer in connection with  
10 essentially the wind-up of WestLB. It has got nothing to do  
11 with the reasonableness of AXA's mortality assumptions or COI  
12 rates or anything like that.

13 But if there is something in there that says that  
14 these policies are subject to these COI increases or anything  
15 like that, we are agreeing to produce those documents.

16 THE COURT: I assume you would also agree anything in  
17 there that would relate to either these are the mortality  
18 assumptions that AXA is using or these are the mortality  
19 assumptions that we would apply or we think that this is  
20 underpriced or overpriced, that would also be subject to  
21 production.

22 MR. LeQUANG: Yes. Our production is based on agreed  
23 search terms. Many of the search terms are centered around  
24 things like underpriced, were or mortalities high, or rates or  
25 things like that. Yeah. We have agreed to produce those

1 documents.

2           This big fight here is because there are going to be  
3 thousands of documents about various transactions and  
4 acquisition, quote, documents that have no bearing at all on  
5 any issue in this case, and we can't just blindly produce all  
6 of these acquisition documents.

7           As an example, too, this goes back to one of the  
8 original policy ownerships or policy structures. There were  
9 loans made to the original insureds. There were loan  
10 agreements. The agreements provided that the policies were the  
11 security for the loans. So you have a number of loan  
12 transaction documents. The original lender foreclosed on the  
13 policies. Then a bank that loaned money to that lender ended  
14 up foreclosing because that lender defaulted. None of these  
15 things have bearing on this. Yet, that's what we are fighting  
16 about here.

17           On the other hand, if they have to do with COI rate  
18 issues, we have agreed to produce them.

19           MS. RAPPAPORT: Your Honor, the documents valuing the  
20 policies for acquisition and diligence for the acquisition  
21 absolutely bear on the issues in this case because how the  
22 plaintiffs or a third party were valuing those documents in the  
23 portfolio necessarily relates to the mortality assumptions that  
24 were being applied. If you are talking about how long a person  
25 is going to live based on a set of an industry table and, as I

1 said, those other factors, that insurance companies and life  
2 settlement investors apply need to understand what mortality  
3 assumptions you're looking at for that particular portfolio  
4 policy or that particular policy in order to understand whether  
5 it's a worthwhile transaction for you.

6 Documents that were acquired during diligence on those  
7 policies or are valuing those policies are absolutely relevant  
8 to this case. And to just brush those aside as, well, they all  
9 relate to this one big transaction, we are entitled to  
10 documents concerning the AULII portfolio and how those were  
11 valued and what mortality assumptions were applied to those  
12 policies.

13 THE COURT: I hear you.

14 I am not persuaded that there is a need for me to  
15 grant any relief at this time, which is to say, that I think  
16 that it sounds to me like the plaintiffs are striking or  
17 drawing the line properly between what is relevant and what is  
18 not relevant. And defendant relies on Judge Francis' decision  
19 in the *U.S. Bank* case where he said that he's not willing to  
20 take at face value U.S. bank's assertion that it has produced  
21 all documents responsive and, therefore, directs them to  
22 produce a broader set of documents. But that's because he  
23 found that the line or their application of the line in that  
24 case was not proper.

25 If that turns out to be the case here and something is

1 revealed that indicates that there are documents that clearly  
2 are relevant that have not been turned over, perhaps I will go  
3 that route. As I said, if I were in plaintiffs' shoes, I might  
4 decide on that basis to produce a broader set of documents and  
5 not draw the line so strictly, which is another way of saying,  
6 you proceed a little bit at your peril.

7 For now, I think you are drawing the line  
8 appropriately, subject to the discussion that we had a few  
9 minutes ago, which is to say, if you agree, for example, that  
10 some subset of individual policy related documents should be  
11 produced so that defendant can make the argument, but on the  
12 basis of a sampling, presumably, that would extend to the  
13 acquisition-related documents concerning those particular  
14 policies as well.

15 Let's try to move quickly through the matters raised  
16 in the second letter. This is at docket No. 144. First, on  
17 e-mails and ESI custodians, am I correct that this pertains  
18 only to the Wells Fargo e-mails at this juncture?

19 MR. LeQUANG: If you are asking me, your Honor, the  
20 answer is yes, and I don't really think there is an issue. In  
21 fact, after receiving this motion, we called AXA's counsel to  
22 make sure they understood, we are producing e-mails from Wells  
23 Fargo, and they confirmed that they did understand that.

24 It was actually the filing of this motion that alerted  
25 us to the fact that, apparently, e-mails that we thought had

1 been produced had not in fact been produced. But had they  
2 raised that with us, because we actually told them we had  
3 produced them, that they had not located any e-mails, we  
4 probably wouldn't have a motion. We would just be dealing with  
5 this. But the separate issue is, those e-mails came out of the  
6 system called FileNet, and FileNet is a shared repository.

7 Wells Fargo, as a securities intermediary, has  
8 primarily an administrative role here, and I don't want to sum  
9 up or categorize all of the duties under the securities account  
10 control agreement, but it is, generally speaking,  
11 administrative and they send, receive correspondence from the  
12 carrier to the entitlement holder, who is EFG. All of the  
13 substantive communications, e-mails, they are put on file now.  
14 Wells Fargo doesn't do much else with regard to the policies.  
15 As you have in the declarations that we submitted, all these  
16 kind of material communications, and they are not very material  
17 when we talk about Wells Fargo. They are on file now.

18 What AXA wants us to do is to go into e-mails of  
19 individual custodians, like the ones who upload the files to  
20 FileNet, and search their independent e-mail systems for  
21 additional e-mails, even though what should be relevant is on  
22 file.

23 The Sedona Conference principles recognize that when  
24 there is an information governance protocol, a protocol for  
25 putting systems on for documents for later use, you can rely on

1 that. Once they actually have a chance to review the documents  
2 and actually understand the scope of Wells Fargo's duties as  
3 securities intermediary, I think they could come back and raise  
4 issues about inadequacy of production, but I doubt that will be  
5 an issue. I will try to keep that simple.

6 THE COURT: Ms. Rappaport, briefly.

7 MS. RAPPAPORT: First of all, the Sedona principles  
8 case that plaintiffs reference has to do with document  
9 preservation, not whether a party has an obligation to search  
10 documents outside of that system, and plaintiffs are making  
11 these distinctions as what they believe are substantive and  
12 important, which is not how discovery works. They are supposed  
13 to be producing documents that are responsive to our discovery  
14 requests.

15 THE COURT: I think Mr. LeQuang's point that anything  
16 that has been responsive has been filed in FileNet.

17 MS. RAPPAPORT: Plaintiffs will not know that because  
18 they are refusing to search the files of, at this point, even  
19 eight, only eight custodians and their individual e-mail boxes.  
20 AXA has searched the files of over 60 custodians in connection  
21 with this litigation. And to request that plaintiff search  
22 eight or other custodians that they believe might have  
23 responsive documents should not pose a significant burden at  
24 all to Wells Fargo.

25 THE COURT: Are you deposing those eight people?

1 MS. RAPPAPORT: It's possible that we will, but we  
2 need to see what the documents are that are coming from those  
3 people, which we have not received yet. I'm not in a position  
4 to fully understand what their roles are other than  
5 representations that have been made to us at this point.

6 THE COURT: I am going to leave it as is for now. If  
7 you depose somebody and determine that there is some basis to  
8 believe that they are likely to be relevant in responsive  
9 documents that are not filed in FileNet, then I would revisit  
10 it, but I am inclined to think that their protocols are  
11 sufficient.

12 Next is documents and information that Wells maintains  
13 in capacities other than as securities intermediary for EFG.  
14 First of all, I take it that there is no longer any dispute  
15 concerning Wells' relationship as trustee to the EAA trusts. I  
16 understand that this case is not being brought by Wells as  
17 trustee for those trusts, but by the trusts directly in  
18 themselves. Is that correct?

19 MR. LeQUANG: That is correct, your Honor.

20 THE COURT: Ms. Rappaport.

21 MS. RAPPAPORT: Yes, your Honor. But the Delaware  
22 code and the position that Wells Fargo holds under the code,  
23 and plaintiffs haven't showed us any documents otherwise, says  
24 the statutory trustee has control of the business and affairs  
25 of the entity to which it is serving as a trustee. Just

1 because it has a role as statutory trustee, as opposed to  
2 common law trustee, is, to AXA, distinction without a  
3 difference for that purpose, and plaintiffs haven't said  
4 anything other than, they are not a common law trustee, so,  
5 therefore, we don't have to produce their documents.

6 MR. LeQUANG: Your Honor, if I may.

7 THE COURT: You may.

8 MR. LeQUANG: I don't know if this is certainly some  
9 confusion. But the fact the trustee has control is not the  
10 issue. Wells Fargo, as a trustee, is a distinct entity from  
11 the trusts, and the trusts don't control everything that Wells  
12 Fargo controls.

13 One thing I want to be clear, the trusts have produced  
14 documents from Wells Fargo as trustee that the trusts have  
15 control over. But the statutory trusts, those entities don't  
16 actually have control over Wells Fargo's internal e-mails.

17 That said, I'm kind of loathe to have much of a debate  
18 about this. If I can confer with Wells Fargo, because I think  
19 at bottom all of this is, do they need to serve a subpoena on  
20 Wells Fargo as trustee for the trust to get certain other  
21 documents. I'm sure we can forego that with further ado. I  
22 would like to offer that I confer with Wells Fargo and see if  
23 we can just agree that the documents will be requests served on  
24 us and will be effectively requested of them without requiring  
25 a subpoena.



1 THE COURT: Why don't you do that and update me a week  
2 from Friday as well. The point of the meet-and-confer rules in  
3 my rules is make that happen before we are here and save me the  
4 time and trouble of both preparing and having to address this  
5 in court, but I will take up that invitation and have you do  
6 that.

7 With respect to Wells Fargo's status as securities  
8 intermediary, does your meet-and-confer offer extend to that as  
9 well?

10 MR. LeQUANG: Well, there is a broader issue on that,  
11 which is, I think that AXA would like the documents from Wells  
12 Fargo for all relationships that Wells Fargo has. Wells Fargo  
13 can't agree to that. They have brought this suit as the  
14 securities intermediary for EFG on the EFG policies. But EFG  
15 is an entitlement holder under the agreement with Wells Fargo.  
16 Wells Fargo is only authorized to bring suit on behalf of EFG.  
17 EFG can't authorize a suit on behalf of various other  
18 entitlement holders. And one example of that would be LSH, who  
19 subsequently filed suit. LSH is another entitlement holder  
20 where Wells Fargo acts as securities intermediary. There are  
21 at least many others. I can't recall offhand the number of  
22 other entitlement holders.

23 THE COURT: Fifty-four, I think.

24 MR. LeQUANG: What AXA wants is that Wells Fargo needs  
25 to go into all of their policy files and all of their FileNet

1 systems and pull all their documents. And that's what Wells  
2 Fargo -- I think the main objection to that is relevance, but  
3 also I think they have duties under their agreements with them  
4 and with those other entitlement holders where they can't just  
5 produce their documents. Our position is, in the first  
6 instance, that other entitlement holders' policies are not  
7 relevant and Wells Fargo should not have to produce those  
8 documents, having brought a claim only as securities  
9 intermediary for EFG.

10 THE COURT: Maybe I don't understand what documents  
11 would be in those files. But what if there are documents that  
12 speak to the reasonableness of the mortality assumptions and  
13 they just happen to be filed in connection with the different  
14 entitlement holder?

15 MR. LeQUANG: For example, and I think I can  
16 represent, although based on what I know today, Wells Fargo  
17 would not be evaluating or making any assessments about the  
18 reasonableness of anybody's mortality assumptions. As a  
19 securities intermediary it is simply the direct holder for an  
20 indirect holder. But would the assumptions of a third-party  
21 entitlement holder not communicated to any of the plaintiffs in  
22 this case that lie in their own files be relevant to this case?  
23 I would submit not. Otherwise, I suppose we could all subpoena  
24 every insurance company in the industry to get their mortality  
25 assumptions and say that they may bear upon the reasonableness

1 of AXA's mortality assumptions.

2 THE COURT: Ms. Rappaport, what do you expect to be in  
3 the documents or files relating to other entitlement holders  
4 that would be relevant here?

5 MS. RAPPAPORT: Your Honor, documents concerning AULII  
6 and documents concerning mortality assumptions applicable to  
7 AULLII and documents concerning AULLII cost of insurance.  
8 Plaintiffs here haven't shown us any agreement that would  
9 preclude Wells Fargo from producing documents that are in these  
10 files of these quote/unquote other entitlement holders, and  
11 there is a confidentiality order in place here which we have  
12 been abiding by, and we produced tons of confidential  
13 information to the plaintiffs, and we have had to go out and  
14 seek relief from other confidentiality agreements that we have  
15 in order to comply with requests in this case, and there is no  
16 reason that Wells Fargo should not be doing the same.

17 The other issue that's raised, and I think probably  
18 relates more to the first motion, your Honor, that we did not  
19 address was the issue of EFG standing to even bring this case.  
20 It claims it's an entitlement holder and it claims it has a  
21 beneficial interest in these policies. But we have seen  
22 nothing from Wells Fargo or EFG to show what policies are  
23 covered by the securities account control agreement.  
24 Plaintiffs have produced a list, but the list was unaccompanied  
25 by any e-mails or attached to any agreement, so we are not even

1 sure what this list purports to be. But that certainly goes to  
2 the standing of EFG to pursue this action and those certainly  
3 would be documents that Wells Fargo may have in its files and  
4 should be produced.

5 THE COURT: That is a different matter and I certainly  
6 would agree that any documents relating to EFG would presumably  
7 be subject to production. We are getting a little bit ahead of  
8 ourselves, but I don't quite understand why documents  
9 pertaining to the reasons that Wells Fargo and EFG entered into  
10 the agreement, whatever the SACA stands for, securities account  
11 control agreement, why that would be relevant. But the  
12 agreement itself and any documents that would verify or  
13 underlie what policies are within the scope of that agreement I  
14 would certainly agree and think should be produced.

15 MS. RAPPAPORT: It's my understanding, your Honor,  
16 that one of the reasons why institutional investors enter into  
17 these securities account control agreements IS to facilitate  
18 the sale or transfer of policies. To the extent that a reason  
19 why they entered into this agreement was because they were or  
20 believed that COI would increase or that it related somehow to  
21 the COI that was on the policies would be relevant to the case.  
22 That's why we are seeking documents concerning the reasons  
23 why --

24 THE COURT: You are already getting documents  
25 concerning their mortality assumptions and COI and the prospect

1 of COI increases and so forth, so that would fall within the  
2 scope of those and you would get them. Beyond that, I don't  
3 see what relevance the reasons that they entered into the  
4 securities account control agreement would have. I don't think  
5 you are entitled to that. But, again, that's separate and  
6 apart from whatever documents are needed to prove that EFG  
7 actually has standing to bring this. They should produce  
8 those.

9 I don't feel I have much a handle of what these other  
10 clients are or what might be in there. It doesn't sound to me  
11 like that they are likely to be relevant or their production  
12 would be proportional to the needs of this case, but in the  
13 interest of time, I am going to leave it there. You can always  
14 raise that with me again, if you discuss it further and you  
15 can't reach some sort of agreement to it, for now I am going to  
16 deny the defendant's motion on that front as well.

17 I think that covers everything, subject to the things  
18 that you'll be discussing in the next week and a half. Did I  
19 miss something?

20 MR. LeQUANG: I think you have covered everything.

21 MS. RAPPAPORT: No, your Honor.

22 THE COURT: The last thing is the sealing matter,  
23 docket No. 159. I received AXA's letter yesterday. I do  
24 approve sealing and redaction relating to Exhibits B and C, but  
25 am I correct that you are not seeking to keep under seal

1 Exhibit A, is that correct?

2 MS. RAPPAPORT: That's correct, your Honor.

3 THE COURT: If you could file that within two days as  
4 well, along with whatever redacted version of this document  
5 that you handed up, that would be great.

6 Anything else? Very good.

7 I expect I will hear from you again, but, hopefully,  
8 you will make some progress.

9 Mr. LeQuang, as I said, make sure you figure out what  
10 you are doing on that Switzerland front. If you are not  
11 intending to seek some sort of relief, and I don't think you  
12 will get it, you better produce it sooner rather than later.  
13 Deadlines are what they are and they are not stayed.

14 MR. LeQUANG: Judge, I understand the issue.

15 THE COURT: Thank you very much.

16 (Adjourned)

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